No. 75-1043

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

LUIS A. LEBRON, JR., PETITIONER

v.

UNITED STATES SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. B) is unreported. The opinion of the district court (Pet. App. C) is reported at 392 F. Supp. 219. The opinion of the Court of Military Review is reported at 46 C.M.R. 1062.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on November 25, 1975. The petition for a writ of certiorari was filed on January 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Article 134 of the Uniform Code of Military Justice prohibits the possession and use of heroin on a military base.

2. Whether the search of petitioner's person and premises violated the Fourth Amendment to the Constitution.

3. Whether Article 52(a)(2) of the Uniform Code of Military Justice, which permits conviction by two-thirds vote of a court-martial, violates the Sixth Amendment to the Constitution.

4. Whether petitioner was denied due process of law when his motion for a new trial was considered by the convening authority and the Court of Military Review, rather than by the court-martial.

STATEMENT

1. In January 1971, petitioner, an airman in the United States Air Force, was convicted by a general court-martial of use and possession of heroin at Keesler Air Force Base, in violation of Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934), on the basis of evidence seized from his person and premises by military police acting pursuant to a search warrant. He was sentenced to six months' imprisonment, forfeiture of pay, and reduction in rank. The conviction was affirmed by the convening authority and by the Judge Advocate General (C.A. App. 37a-38a).[1] Petitioner completed service of his sentence on June 17, 1971.

[1]"C.A. App." refers to the appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court. Articles 66(b) and 69 of the U.C.M.J. (10 U.S.C. 866(b) and 869) provide that court-martial convictions in which the sentence imposed does not include confinement for more than one year or a bad conduct discharge are not reviewed by the Court of Military Review unless, after examining the record, the Judge Advocate General so directs or finds the conviction or sentence unsupported in law. Here, the Judge Advocate General found the conviction supported in law and did not direct review by the Court of Military Review (C.A. App. 38a). Petitioner did not request further review by the Judge Advocate General on the basis of the errors alleged in the petition, as he could have done under Article 69.

2. In December 1971, in an unrelated proceeding, petitioner was convicted by a general court-martial of aggravated assault upon a fellow airman at Keesler Air Force Base, in violation of Article 128 of the U.C.M.J. (10 U.S.C. 928). He was sentenced to three years' imprisonment, forfeiture of pay, and a bad conduct discharge. The conviction was affirmed by the convening authority and by the Court of Military Review. Petitioner's application for review was denied, without opinion, by the United States Court of Military Appeals (46 C.M.R. 1323). Petitioner served 15 months in prison and was discharged from parole on February 5, 1974.

3. In December 1973, petitioner sought habeas corpus relief from his convictions in the United States District Court for the District of Columbia. Because petitioner was on parole at that time in the Southern District of New York, the complaints were transferred pursuant to 28 U.S.C. 1404(a) to the district court in that district, which granted the government's motion for judgment on the pleadings and dismissed the complaints (Pet. App. C). The court of appeals affirmed in a memorandum opinion (Pet. App. B).

ARGUMENT

1. Petitioner contends (Pet. 9-10) that Article 134 of the Uniform Code of Military Justice, the so-called "general article," does not apply to narcotics offenses committed on a military base. Article 134 prohibits, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces * * * and crimes and offense not capital," not specifically proscribed by any other article. Since possession and use of heroin are "crimes and offenses" that are not expressly prohibited by another article, they fall within Article 134. Cf. *Grafton* v. *United States*, 206 U.S. 333, 348.

This conclusion is supported by the *Manual for Courts-Martial, 1969* (Rev. ed.), which states in two separate provisions (para. 213(b); App. 6c-22) that the possession or use of "habit-forming narcotic drugs" is punishable under Article 134.

Moreover, the Court of Military Appeals has held that the use and possession of narcotics "by military persons is a matter of immediate and direct concern to the military as an act intimately concerned with prejudice to good order and discipline * * * of the armed forces." *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 565. Such offenses have special military significance because of the "disastrous effects" of narcotics "on the health, morale and fitness for duty of persons in the armed forces." *Id.* at 565. See also *Schlesinger* v. *Councilman*, 420 U.S. 738, 760-761, n. 34. Consequently, civilian courts have upheld convictions for narcotics offenses under Article 134. See, *e.g.*, *Peterson* v. *Goodwin*, 512 F.2d 479, 480 (C.A. 5), certiorari denied, 423 U.S. 931; *Diorio* v. *McBride*, 431 F.2d 730 (C.A. 5).

Finally, there is no support for petitioner's claim that *Parker* v. *Levy*, 417 U.S. 733, which upheld the constitutionality of Article 134 on its face and as applied to "aspects of the conduct of members of the military which in the civilian sphere are left unregulated" (417 U.S. at 749), intended to limit the scope of the Article to conduct that was "peculiarly military." Not only did the Court note in *Parker* that portions of the *Manual for Courts-Martial* "describe more than sixty illustrative offenses" under Article 134 (417 U.S. at 753)—including, as noted above, narcotics offenses—but also Mr. Justice Blackmun, in a concurring opinion, expressly mentioned the use of narcotic drugs as being within the scope of the Article. 417 U.S. at 763. See also *Relford* v. *United States Disciplinary Commandant*, 401 U.S. 355, 362-369.

2. Petitioner contends (Pet. 11) that the search of his person and premises, which produced evidence of the narcotics offense, violated the Fourth Amendment because, although the warrant authorizing the search was issued by the Vice Commander upon probable cause, it was supported by unsworn statements of an Air Force special agent. This Court, however, "has adhered uniformly to 'the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts * * * .'" *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 746. Since the error alleged by petitioner would not render his conviction void "because of lack of jurisdiction or some other equally fundamental defect," *id.* at 747, the claim is not cognizable on collateral attack. Moreover, petitioner's claim was given full consideration by the military courts (see Pet. App. 7a). See *Burns* v. *Wilson*, 345 U.S. 137, 144.

In any event, petitioner's contention is insubstantial. Although a person does not surrender his constitutional rights when he enters the military, "the different character of the military and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it." *Parker* v. *Levy*, *supra*, 417 U.S. at 758. See also *Greer* v. *Spock*, No. 74-848, decided March 24, 1976; *Middendorf* v. *Henry*, No. 74-175, decided March 24, 1976; *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 474-477 (C.A. D.C.). In view of the substantially lesser expectation of privacy in the armed forces and the compelling necessity for base commanders to be able to authorize inspections of persons and places under their control, there is no requirement

that search warrants be supported by affidavits. See *Wallis* v. *O'Kier*, 491 F. 2d 1323 (C.A. 10), certiorari denied, 419 U.S. 901; *United States* v. *Rogers*, 388 F. Supp. 298, 304 (E.D. Va.). The standard of reasonableness certainly is satisfied if, as here, the search warrant is issued upon probable cause, it specifically describes the objects to be seized, and it is approved by an officer who "stands in the same relation *vis-a-vis* the investigating officer and an accused as the Federal magistrate." *United States* v. *Hartsook*, 15 U.S.C.M.A. 291; *United States* v. *McFarland*, 19 U.S.C.M.A. 356; *United States* v. *King*, 36 C.M.R. 929, 934), petition for review denied, 35 C.M.R. 541. See Moyer, *Justice and the Military*, Section 2-113 (1972 ed.).

3. Petitioner contends (Pet. 10-11) that his assault conviction violated the Sixth Amendment because Article 52(a)(2) of the U.C.M.J. (10 U.S.C. 852(a)(2)) provides that in all military trials, with the exception of those in which the death penalty is mandatory, conviction may be rendered with the concurrence of two-thirds of the members of the court-martial. Article 52(a)(2), however, is a proper exercise of the power of Congress "to make Rules for the Government and Regulation of the land and naval Forces" (Constitution, Art. I, §8, cl. 14) and is fully consistent with numerous decisions of this Court that servicemen are excluded from the constitutional right to trial by jury. See, *e.g.*, *O'Callahan* v. *Parker*, 395 U.S. 258, 263; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127; *Ex parte Quirin*, 317 U.S. 1, 40-41; *Kahn* v. *Anderson*, 255 U.S. 1, 8; see also *Schilder* v. *Gusik*, 195 F.2d 657 (C.A. 6), certiorari denied, 344 U.S. 844; *United States* v. *Greene*, 20 U.S.C.M.A. 232. Indeed, even in civilian courts unanimous jury verdicts are not a requirement of due process. *Johnson* v. *Louisiana*, 406 U.S. 356; *Apodaca* v. *Oregon*, 406 U.S. 404.[2]

4. Petitioner contends (Pet. 8-9) that he was denied due process of law on his assault conviction because the Uniform Code of Military Justice does not provide for consideration of a new trial motion by the court-martial. But there is no constitutional requirement that such motions be heard by the trial court, and Congress has enacted alternative procedures for the military, in full accord with due process, by which such motions may be heard by neutral authorities empowered to grant relief. Under Article 73 of the U.C.M.J. (10 U.S.C. 873), new trial motions may be made within two years after approval of the conviction by the convening authority. If the case is pending before either the Court of Military Review or the Court of Military Appeals, the motion is heard by the appropriate court; otherwise, it is acted upon by the Judge Advocate General. *Manual for Courts-Martial*, para. 109. Although there is no formal procedure for making such motions before affirmance by the convening authority, as a practical matter the convening authority may consider such new evidence as a defendant may call to its attention. Moreover, as the procedures set forth below demonstrate, the convening authority

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[2]Although Mr. Justice Powell, concurring in *Apodaca*, stated that jury "unanimity is one of the indispensible features of *federal* jury trial," he was obviously referring to civilian jury trials, which are governed by the Sixth Amendment. History clearly indicates that military courts, established under Article I rather than Article III of the Constitution, are not within the jury-trial provisions of that Amendment. See Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 Catholic U.L. Rev. 171 (1966); Henderson, *Courts-Martial and the Constitution: the Original Understanding*, 71 Harv. L. Rev. 293 (1957).

acts as a neutral reviewing officer and not as "a charging party."[3]

Following a military conviction, the trial record is forwarded to the convening authority for review. Before acting on the record, the convening authority is required to refer it to the staff judge advocate (who must be an attorney who has not previously participated in the case) for review and advice. *Id.* at para. 85a. Although the convening authority normally follows the recommendation of the staff judge advocate (and must set forth any reasons for departing from the action recommended, *id.* at para. 85c), it cannot merely rely upon that recommendation. The convening authority must undertake an independent review of the record, which may include weighing evidence, judging credibility of witnesses, and determining controverted questions of fact; the conviction cannot be affirmed except upon a determination that the finding of guilt was established beyond a reasonable doubt by competent evidence of record. *Id.* at para. 87a(3).

If the convening authority determines that an error was committed by the court-martial, the conviction may not be approved unless it concludes that a court of reasonable and conscientious persons would have reached the same result in the absence of the error; the conviction also may not be affirmed if the error was so flagrant a violation of fundamental rights as to deprive the defendant of a fair trial. *Id.* at para. 87c. Finally, while there is no formal procedure for presenting a motion for a new trial on the basis of newly discovered evidence to the convening authority, it may

[3]A commanding officer who is an "accuser," as defined in Article 1(9) of the U.C.M.J. (10 U.S.C. 801(9)), may not convene a court-martial. Article 22(b), U.C.M.J. (10 U.S.C. 822 (b)); *Manual for Courts-Martial*, para. 5(a)(3) and (4).

disapprove a conviction on the basis of matters outside the record, although it may not consider such matters in approving the conviction. *Id.* at paras. 85b, 87a(3). If the conviction is disapproved, the convening authority may order a new trial or dismiss the charges. Article 63(a), U.C.M.J. (10 U.S.C. 863(a)).

In accordance with these procedures, petitioner received full and fair consideration of the matters raised in his motion for a new trial by both the convening authority and the Court of Military Review. The careful review of petitioner's motion by the convening authority is set forth in the opinion of the Court of Military Review (46 C.M.R. at 1065):

> Following trial, but before action on the record was taken, an attorney retained by the accused's family submitted to the convening authority an affidavit by a former airman named Gill. In the affidavit, Gill admitted to doing certain acts which would, if true, make him guilty of the crime charged against the accused and completely exonerate the accused. The attorney referred the convening authority to paragraph 85b of the Manual for Courts-Martial, 1969 (Revised edition), which deals with the staff judge advocate's evaluation of the findings in his review, and "to the spirit of Article 73, UCMJ", which deals with petitions for new trial. In addition, he asked that the accused not be reassigned "until this matter has been thoroughly explored and a decision made."

Although the staff judge advocate proceeded to prepare a review, the convening authority deferred taking action on the record, and caused the Office of Special Investigations to investigate the matters presented him by the accused's counsel. Upon completion of the investigation, the staff judge advocate

> in a supplemental review, carefully examined the results of the investigation, and analyzed the affidavit, together with certain verbal statements made by Gill to the investigators. Also considered in the evaluation of Gill's affidavit and oral statements, were laboratory tests conducted in the course of the post-trial investigation. As a result, the staff judge advocate concluded the discrepancies in Gill's statements, when compared with laboratory tests, and the evidence presented at trial, justified the conclusion that Gill was not confessing to the crime of which the accused had been convicted, and recommended to the convening authority that he act on the record. Though not spelled out, it is obvious that he urged approval of the findings and sentence, as he had done at the time of the original review. This was done.

The Court of Military Review itself also fully considered Gill's alleged confession and concluded that the petition for a new trial should be denied. 46 C.M.R. at 1067-1068.[4]

In sum, the procedures provided for new trial motions after court-martial convictions are fair and reasonable. There is no support for the proposition that such motions must be considered by the trial court, nor would such a rule be feasible in the military, since "[a] court martial has neither continuity nor situs and often sits to hear only a single case." *Jackson* v. *Taylor*, 353 U.S. 569, 579. The courts below therefore correctly concluded that petitioner was not deprived of due process of law.

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[4]Review by the Court of Military Review also is plenary and is not limited to questions of law. Article 66, U.C.M.J. (10 U.S.C. 866). That court also may order an investigation if appropriate. *Manual for Courts-Martial*, para. 109f.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys.

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